WP(C) 4739/2002

HON'BLE MR. JUSTICE B.P. KATAKEY

The petitioners, who belong to general category, by the present writ petitions have challenged the legality and validity of the gradation list dated 02.07.2002 issued by the Commissioner and Secretary to the Govt of Assam wherein the names of the petitioners are placed below the Respondent Nos. 4 to 12 in Writ Petition (C) No.4739/02 and Respondent Nos. 3 to 11 in W.P(C) No.4740/02 (hereinafter referred to as private Respondents), who belong to the reserved category. The other respondents i.e. Respondent Nos. 13 to 54 in W.P(C) No.4739/02 and Respondent Nos. 12 to 45 in W.P(C) No.4740/02, who have been impleaded on the basis of the applications filed by them, are not concerned in the mater of fixation of inter se seniority of the petitioners and the aforesaid respondents, as they were recruited in the batch earlier to the petitioners and the petitioners do not claim any relief against them.

2. Both the writ petitioners and the private respondents were directly recruited to the Assam Civil Service (hereinafter referred to as ACS) Class-I service on the basis of the recommendation of the Assam Public Service Commission in the year 1983, under the provisions of the Assam Civil Services (Class-I) Rules, 1960 (in short 'the 1960 Rules'). The petitioners belong to the general category and the private respondents are of reserved category. Pursuant to the provision contained in Rule 25 of the 1960 Rules for promotion to ACS Senior Grade, a select list was prepared by the Selection Committee constituted for the purpose on 29.05.89 wherein the names of the writ petitioners as well as the private respondents appeared. In the said select list names of the writ petitioners appeared at Serial Nos.55 to 62, 64 to 71, 73 to 77, 79 to 82, 87 to 95 and 97 and that of the private respondents at Serial Nos.72, 86, 98 to 103 and 105 . Since the said respondents belong to reserved category, as per roster they were promoted to ACS Senior Grade on 01.08.1989, except the Respondent No.4 in W.P(C) No. 4739/2002, who was promoted to the said Grade on 03.06.1998. The petitioners were promoted to the said Grade on different dates in the years 1991- 1992. Thereafter a draft gradation list showing inter se seniority position of all Officers of ACS Class I as on 01.01.1993 was published by the Department of Personnel, Government of Assam, wherein the names of the petitioners were placed at Serial Nos. 188 to 203, 205 to 209, 211 to 214, 219 to 227 and 229 and that of the private respondents at Serial Nos.204, 218, 230 to 235 and 237. Being aggrieved by the placement in the said gradation list, the private respondents filed representations and the authority thereafter on 02.07.2002 published the final gradation list placing the names of the said respondents at Serial Nos. 47 to 55 and that of the petitioners at Serial Nos. 56 to 76, 78 to 81, 85 to 93 and 95. Before publication of the final gradation list an office memorandum dated 12.03.2002 was issued by the Commissioner and Secretary to the Government of Assam, Personnel Department laying down guidelines for fixation of seniority of the reserved vis- -vis the general category candidates in the promotional posts stipulating that the reserved category candidates shall be, on their promotion by virtue of rule of reservation/roster, be entitled to consequential seniority also, consequent upon Constitution (Eighty fifth Amendment) Act, 2001 whereby Article 16(4)(A) has been inserted. However, the said office memorandum regarding entitlement to the consequential seniority by the reserved category candidates on their promotion by virtue of the rule of reservation/ roster has been given effect to from 17th June, 1995. The petitioners, therefore, are challenging the said final gradation list dated 02.07.2002 whereby the private respondents, who belong to reserved category, are placed above them, on the ground that the same is contrary to the seniority rules prescribed in 1960 Rules.

3. I have heard Mr. P.K.Goswami and Mr.A.M. Majumdar, learned Senior Counsel appearing on behalf of the petitioners and Mr. D.K.Mishra, learned Senior Counsel appearing for the private respondents in W.P(C) No.4739/02, Mr. M.Sarania, learned counsel appearing on behalf of the private respondents in W.P(C) No. 4740/02 as well as Mr. A.K.Thakur, learned Govt Advocate appearing on behalf

of the State Respondents in both the writ petitions. None appears on behalf of other respondents.

4. Mr. Goswami, learned Senior Counsel appearing on behalf of the petitioners in W.P(C) No. 4739/02 challenging the final gradation list dated 02.07.2002 published by the authority, has submitted that the provision of Article 16(4) (A), which has been inserted by the Constitution (Eighty fifth Amendment) Act came into force with effect from 17.06.95, whereby the State has been empowered to make provisions for reservation in the matter of promotion with consequent seniority to any class or classes of posts under the State in favour of Scheduled Caste and Scheduled Tribe, cannot be made applicable in the present case as the promotion to ACS Senior Grade was effected in the present case prior to coming into force of the said amendment i.e. on 17.06.1995 and in any case the same being the provision enabling the State to make provision for consequential seniority, in the absence of any rule framed for that purpose, the Respondents who belong to reserved category and were junior in the feeder post, cannot be held senior in the promotional post i.e. ACS Senior Grade, after the petitioners were promoted. It has further been submitted by Mr. Goswami that the seniority in ACS Senior Grade is to be fixed in terms of the provision contained in the 1960 Rules. According to Mr. Goswami, Rule 25 of 1960 Rules provides for the selection for promotion to Senior Grade on the basis of seniority with due regard to the merit and from the list prepared by the Selection Committee for that purpose. Rule 26 of the said Rules having provided the manner of fixation of seniority of the members of the service promoted to the Senior Grade time scale or to Senior Grade-I time scale in the order in which their names are arranged by the Selection Committee under sub-rule (3) of Rule 25 for the purpose of promotion to the respective grade, The petitioners having placed at Serial Nos. 55 to 62, 64 to 71, 73 to 77, 79 to 82, 87 to 95 and 97 and the private respondents at Serial Nos. 72, 86, 98 to 103 and 105 in the said list, the petitioners cannot be held to be junior to all the said respondents and consequently the gradation list dated 02.07.2002 published by the authority, placing the private respondents over the petitioners, by applying the provisions of Article 16(4)(A) of the Constitution, is highly illegal, which requires interference by this Court. Mr. Goswami has further submitted that even the office Memo dated 12.03.2002 issued by the Commissioner and Secretary to the Government of Assam, Personnel Department, laying down the guidelines for the purpose of fixation of seniority of reserved vis- -vis general category candidates, provides that same will be effective from 17.06.1995 and the petitioners' and the private respondents' promotions being prior to that date, the said office memorandum cannot be applied in the matter of fixation of seniority of the petitioners vis- -vis the private respondents in promotional posts of Senior Grade. Therefore, the fixation of seniority of the said respondents over the petitioners in the final gradation list dated 12.03.2002 on the basis of such office memorandum is highly illegal being contrary to the provision of the 1960 Rules and as such, necessary directions may be issued to the Respondent authorities to recast the seniority of the petitioners and the private respondents in the order in which their names are arranged by the Selection Committee under Rule 25(3) of the 1960 Rules. In support of his contention, Mr. Goswami has placed reliance on the decision of the Apex Court in Virpal Singh Chauhan Vs Union of India & Ors., 1995 (6) SCC 684 as well as in M. Nagaraj & Ors vs. Union of India & Ors, (2006) 8 SCC 212.

5. Mr. Mazumdar, learned Senior Counsel appearing on behalf of the petitioners in W.P(C) No. 4740/2002, adopting the arguments of Mr. Goswami, has also contended that the seniority of the petitioners vis- -vis the private respondents is to be fixed on the basis of the provision contained in Rule 26 of the 1960 Rules, there being specific provision for fixation of seniority in the order in which the names of the selected persons appear in the list prepared by the Committee for the purpose of promotion and therefore though the respondents were promoted to the promotional post prior to the promotion of the petitioners, the petitioners' seniority is to be fixed above the respondents by following the ca

tch-up rule on the basis of the position in the select list prepared under Rule 25(3) of the said Rules, on their promotion.

6. Mr. Mishra, learned Senior Counsel appearing for the private Respondents in W.P(C) No. 4739/2002 has submitted that admittedly the said respondents, except the respondent No.4, were promoted to Senior Grade on 01.08.89 i.e. much prior to promotion of writ petitioners, who were promoted in the year 1991-92 and hence they have to be placed above the petitioners in the seniority list, except the respondent No.4 who was promoted on 03.08.1998, since Rule 26 of the 1960 Rules does not provide for catch up principle or the catch up rule so as to restore seniority of the petitioners over the respondents on the basis of their position in the select list. It has further been contended by Mr. Mishra that law laid down by the Apex Court in Virpal Singh Chauhan (supra) is distinguishable and cannot be made applicable in the present case since in Virpal Singh Chauhan's case there is a set of rules governing determination of seniority between reserved and the general category candidate on the basis of their position in the select list. According to learned Senior Counsel as the 1960 Rules does not provide for determination of seniority between the reserved category and general category candidates on the basis of their position in the select list, the catch up rule as evolved by judicial pronouncement, cannot be applied in the present case. In the alternative, it has further been submitted that the catch-up rule being judicially evolved in Virpal Singh Chauhan's case in 1995, the ratio laid down in the said case cannot be made applicable in the present case, as in the instant case the question of seniority relates to the period prior to the date of judgment in Virpal Singh Chauhan (supra), since the said judgment do not have retrospective effect.

7. Mr. Sarania, learned counsel for the private respondents in W.P(C) No. 4740/2002, has adopted the arguments of Mr. D.K.Mishra, learned Senior Counsel.

8. Mr. Thakur, learned State counsel appearing for the State Respondents relying upon the affidavit-in-opposition filed on behalf of the said Respondents has submitted that the gradation list dated 02.07.2002 has been rightly prepared and published by the authority as the private respondents were promoted to ACS Senior Grade in the year 1989 and the petitioners were promoted on different dates in the year 1991 and 1992, although from the same select list, and the said respondents by virtue of Constitution (Eighty fifth Amendment) Act, inserting Article 16(4)(A), are entitled to consequential seniority, being the reserved category candidates.

9. I have considered the submissions of the learned counsel for the parties and also perused the pleadings as well as the records produced by the learned State Counsel.

10. There is no dispute to the fact that both the petitioners as well as the private respondents were directly recruited to ACS Class-I (Junior Grade) pursuant to their selection by the Public Service Commission in the year 1983. The petitioners belong to general category and the private respondents belong to reserved category. The fact relating to the selection of the petitioners as well as of the private respondents, for the purpose of promotion, their position in the list prepared by the Selection Committee for promotion and also their dates and years of promotion to ACS Senior Grade, as noticed above, are not in dispute.

11. Rule 25 of the 1960 Rules provides for promotion from Junior Grade to Senior Grade time scale. Sub-rule (3) of Rule 25 provides that appointment to Senior Grade time scale or Senior Grade-I time scale, as the case may be, shall be made by the Governor from the respective lists of suitable members of se

rvice as prepared from time to time and reviewed, as and when necessary, by a Selection Committee as provided in the said Rule. Rule 26 of the said Rule provides that seniority of members of the service promoted to the Senior Grade time scale or to the Senior Grade-I time scale, as the case may be, shall be in the orders in which their names are arranged by the selection committee under sub-rule (3) of Rule 25 for the purpose of promotion to respective grades. For better appreciation, Rules 25 and 26 of the 1960 Rules are quoted below:-

25. Promotion to Senior Grade time scale - (1) A member of the service in the junior grate time scale shall be eligible for promotion to the senior grade time scale but no member of the service shall be so promoted unless he has served in the junior grade time scale for minimum period of seven years on the first day of January of the year in which the promotion is considered and the Governor is satisfied about his ability, integrity and character.

(2) Promotion to the Senior Grade-I time scale- Promotion to the Senior Grade-I time scale shall be made from amongst the eligible members of the service on the basis of seniority with due regard to merit. A member of the service in the Senior grade time scale shall be eligible for promotion to the Senior Grade-I time scale if he has completed 22 years of service in the Assam Civil Service (Class-I) cadre of which 9 years must be in the Senior gRde time scale on the first day of January of the year in which the promotion is considered.

(3) Appointment to the Senior Grade time scale or to the Senior Grade-I time scale as the case may be, shall be made by the Governor from the respective list of suitable members of the service, as prepared from time to time and reviewed, as and when necessary, by a Selection Committee consisting of the following:-

CHAIRMAN:

(i) Chief Secretary to the Government of Assam.

MEMBERS:
(ii) Two Commissioners of Divisions nominated by the Government;
(iii) Planning and Development Commissioner to the Government of Assam.
(iv) Agricultural Production Commissioner, Assam.
(v) Secretary to the Government of Assam in Personnel Department.
To transact any business in a meeting of the Selection Committee there shall be present at least 4 members including the Chairman which shall form a quorum.

26. The seniority of members of the service promoted to the Senior Grade time scale or to the Senior Grade-I time scale, as the case may be, shall be in the order in which their names are arranged by the Selection Committee under sub-rule (3) of Rule 25 for the purpose of promotion to the respective Grade.

12. The record produced by the State reveals that for the purpose of promotion to senior grade time scale a list of selected officers was prepared on 29.05.1989. It also reveals from the record that a fresh list was thereafter prepared only on 12.03.2002 and in between these two dates no other list, as required under Rule 25, has been prepared for promotion to Senior Grade time scale. In the list dated 29.05.1989 prepared by the Selection Committee, as required under Rule 25, as noticed above, the names of the petitioners appeared in Serial Nos. 55 to 62, 64 to 71, 73 to 77, 79 to 82, 87 to 95 and 97 and that of the Respondents in Serial Nos. 72, 86, 98 to 103 and 105. The said respondents being the reserved category candidates, were given accelerated promotion against the roster points on 01.08.1989, except the respondent No.4, who was promoted on 03.06.1998. The petitioners in both the writ petitions were promoted to the said grade by virtue of their same selection as of the private respondents on 29.05.1989, in the year 1991 and 1992. In the impugned final gradation list published on 02

.07.2002 all the private respondents were shown to be senior to the petitioners, which according to the State Government, was done by virtue insertion of Article 16(4)(A) by the Constitution (Eighty fifth Amendment) Act.

13. The Apex Court in Virpal Singh Chauhan's case while considering the provision of the seniority rule applicable to the reserved as well as the general candidates in Railway Service, in the promotional posts, has observed that seniority between the reserved category and general category in the promoted category shall continue to be governed by their position in the selection panel prepared for the purpose of promotion and that the reserved category candidate because of application of rule of reservation though gets accelerated promotion, the general category candidate on their promotion to the promotional post will get beck their seniority over the reserved category candidate on the basis of their position in the panel prepared for the purpose of promotion.

14. The contention of Mr. Mishra, learned Senior Counsel appearing in W.P(C) No. 4739/02 that the ratio laid down in Virpal Singh Chauhan (supra) cannot be applied in the present case as Virpal Singh Chauhan's case was decided on the basis of seniority rule governing the railway service containing the provision of fixation of seniority in the promotional post on the basis of the position in the select list, which according to the learned counsel is lacking in the present case, cannot be accepted in view of the fact that similar provision has also been made in Rule 26 of the 1960 Rules, which provides for fixation of seniority of the members of the service on promotion in the order in which their names are arranged in the select list prepared by the Selection Committee under Rule 25(3) of the said Rules. The contention of the learned Senior Counsel for the private respondents that the judgment in Virpal Singh Chauhan (supra) having been delivered on 10.10.1995 evolving catch up rule cannot be applied in the present case, as in this case the question of seniority relates to period prior to delivery of such judgment, also cannot be accepted, as the final gradation list which has been impugned in the present writ petitions was published on 02.07.2002 i.e. much after the decision of the Apex Court in Virpal Singh Chauhan's case. It is a settled position of law that the authority while deciding the seniority is required to follow the law laid down by the Apex Court, as stood on the date of determination of such seniority, as the same is binding on all.

15. Rule 26 of the 1960 Rules having provided the manner in which seniority of the members of the service, promoted to senior grade time scale, is to be determined i.e. in the order in which their names are arranged by the Selection Committee under Rule 25(3) of the Rules, the seniority of the petitioners vis- -vis the private respondents are to be fixed, in the promotional posts, in the order in which their names are arranged in the select list dated 29.05.1989 prepared under Rule 25(3) of the 1960 Rules. Provisions of Article 16(4)(A) of the Constitution cannot be made applicable on two counts, firstly, it came into effect from 17.06.1995 i.e. much after the promotion of the petitioners as well as respondents to the senior grade time scale and, secondly, the State has not framed any rule making provision for accelerated seniority after insertion of Article 16(4)(A) by the Constitution (Eighty fifth Amendment) Act. The Apex Court in M. Nagaraj (supra) has observed that Article 16(4)(A) is the enabling provision enabling the State to make law in that respect. In the present case, as discussed above, no law has been framed by the State giving accelerated seniority to the reserved category candidate who got accelerated promotion because of the roster points. On the other hand, Rule 26 of the 1960 Rules, as discussed above, has provided for determination of seniority, in the promotional post, in the order in which names of the members of the service are arranged by the Selection Committee under Rule 25(3) of the said Rules. It is a settled position of law that the seniority is to be fixed in terms of the rules framed for that purpose. The 1960 Rules has been framed by the Government of Assam in exercise of power conferred by proviso to Article 309 of the Constitution and therefore the seniority of the petitioners vis- -vis the private respondents has to be fixed, on their promo

tion to Senior Grade time scale, on the basis of Rule 26 i.e. in the order in wh ich their names were arranged under Rule 25(3) of the Rules. Further, the guidel ines issued by the Commissioner and Secretary to the Govt of Assam, Personnel De partment on 12.03.2002 cannot be made applicable in the present case as it is ev ident from the said office memorandum that the said guidelines is effective from 17.06.1995 i.e. from the date when the Constitution (Eighty fifth Amendment) Ac t came into force.

16. In the instant case, the seniority of the private respondents, w ho belong to reserved category, has been fixed in the impugned gradation list da ted 02.07.2002 above the petitioners, who belong to general category, without fo llowing the provisions of Rule 26 of the 1960 Rules as aforesaid. Fixation of se niority of private respondents over the petitioners, is, therefore, contrary to the provisions of 1960 Rules and hence set aside. The respondent authorities are required to recast the seniority of the petitioners vis- -vis the private respo ndents in the Senior Grade time scale in the order in which their names are arra nged by the Selection Committee in the list prepared under Rule 25(3) of 1960 Ru les. The Respondent authorities are, therefore, directed to recast the seniority accordingly and to publish a fresh gradation list.

17. In view of the aforesaid discussion, the writ petitions are allo wed to the extent indicated above. No cost.